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No. 98-354

IN THE SUPREME COURT OF THE UNITED STATES

KYLEEN FISCHER,

Petitioner,

v.

STATE OF FLORIDA, DIVISION OF ELECTIONS AND THE FLORIDA ELECTIONS COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The First District Court of Appeal of the State of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can the State of Florida impose punishment upon candidates for political office for statements made in the course of a political campaign which, as a matter of law, are not violative of the standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

PARTIES TO THE PROCEEDING

The Petitioner is Kyleen Fischer who was a candidate for election to the School Board of Lake County, Florida, at the general election held in November of 1994.

The Respondents are the Division of Elections of the State of Florida and the Florida Elections Commission, which are responsible for enforcing Florida's election laws.

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BRIEF IN OPPOSITION

Respondents, State of Florida, Division of Elections and the Florida Election Commission, respectfully request that this Court deny the petition for writ of certiorari seeking review of the First District Court of Appeal's decision in this case.

STATEMENT OF THE CASE

Kyleen Fischer (Republican) and Sandra Green (Democrat and the incumbent) were opposing candidates for the Lake County School Board, District 5 seat, in the 1994 general election. Ms. Green lost the election by 1170 votes.

The Fischer campaign was run with a volunteer staff that primarily consisted of the candidate; her daughter, Leah Fischer; Judy Susie Farley, the campaign manager; Ron Phillips, a family friend and experienced political operative who served as advisor/consultant; and other friends and family. This case centers around two political advertisements created by Fischer and her campaign.

The Flyer

The Fischer campaign, with the candidate's review and approval, produced a political advertisement in the form of a mailing flyer during the general election campaign. The flyer dealt with Green's purported advocacy of the consolidation of the Eustis and Umatilla high schools and closure of Umatilla High School, a position (if it had been espoused by a candidate) which would have been a "hot button" issue in the campaign. The flyer was mailed to residents in Umatilla, a community of approximately 2,200.

Kyleen Fischer, Leah Fischer, and Ron Phillips participated in drafting the language that was used in the political advertisement. In drafting the language in the political advertisement, they relied exclusively on a newspaper article in *The North Lake Outpost*. The political advertisement contained the following statement: "One School Board Candidate Wants to Close Umatilla High School." This statement was not true. Sandra Green did not want to close Umatilla High School in 1994. At no time during the 1994 election did she advocate either the consolidation of Umatilla and Eustis high schools or the closing of Umatilla High School.

The political advertisement also contained the following statement: "A group of parents and teachers from Eustis and Umatilla, under the guidance of school board member Sandra Green are examining the possibility of consolidating Umatilla and Eustis High Schools." This statement was also untrue. The only meeting held to examine the possibility of consolidating Umatilla and Eustis high schools at which Green was a participant was held

two years before the 1994 elections. While Green had appeared to favor consolidation at the time of that meeting, she never publicly discussed the issue again until Fischer circulated the political advertisement in her 1994 campaign. Fischer was aware of this fact when the article was composed.

The political advertisement continued as follows: DEMOCRAT GREEN STATED: "Green said ... she personally favored consolidation for Eustis and Umatilla." This statement was untrue. Although, the advertisement said "DEMOCRAT GREEN STATED," the advertisement quoted *The North Lake Outpost* article and not Ms. Green. Ms. Green never made the statement quoted in the advertisement. The newspaper's reporter had merely paraphrased Green.

Finally, the language in the flyer also omitted language that qualified Ms. Green's position on consolidating the high schools without indicating that the qualifying language was omitted, thus rendering the statement in the flyer misleading. Without the qualifying language the statement implied that Green would act on her own to bring the consolidation of Eustis and Umatilla high schools about. Such a position would have inflamed public opinion against her in light of the importance to small communities such as Eustis and Umatilla of retaining their local high schools.

The Radio Advertisement

The single most important issue in the school board race was the fate of the Eustis Middle School which was in a state of disrepair. The Eustis Middle School, formerly the all black Cartwright High School, was located in and serviced the African-American community in Eustis. In the Spring of 1994, the Lake County School Board, by a vote of three to two, decided not to build a new middle school, but to repair the existing school. The dissenting members, one of whom was Sandra Green, wanted to build a new school at a different location.

In the 1994 election, three of the five school board seats were up for election. The African-American community was very interested in retaining its majority on the issue and in electing candidates who wanted to keep the Eustis Middle School at its present site. As a result, Tom Poole, President of the Voters' League of Lake County, became actively involved in evaluating each candidate's position on the Eustis Middle School and providing that information to the African-American community. In addition to his involvement with the League, Poole was president of the Tri-City branch of the National Association for the Advancement of Colored People ("NAACP") from 1968 until 1994. The constitution of the NAACP prohibits all of its branches from endorsing candidates and the Tri-City Branch of the NAACP (which includes the school board district) did not endorse either candidate in the school board race.

The League had been a consistent supporter of Kyleen Fischer during her political career. The League first supported Fischer when she ran successfully for the school board in 1982. The League also supported her in the 1994 Republican primaries and it actually selected Fischer over Green in the 1994 general election. The main reason why the League endorsed Fischer over Green was because Green was deadly opposed to the Eustis Middle School staying at its present location. Fischer was viewed as having a position which was closer to that of the League-a fact known to Fischer.

Nevertheless, after being led to believe that the League might endorse Green, Fischer decided to air a radio advertisement as a preemptive strike to keep from being "sandbagged" by the League, Poole and Green. The radio advertisement (which aired the weekend before the election) stated as follows:

> During the 1994 election season here in Lake County, we have seen many political deals. There is one Republican School Board candidate who refuses to make political deals. Kyleen Fischer has

> refused to change her position on building a new Eustis Middle School. This position has cost her politically. The NAACP has endorsed her opponent, Sandra T. Green. Kyleen Fischer will not make political deals with our children's future. On November 8, vote "No" on political deals. Vote "Yes" for Kyleen Fischer, School Board. Paid Republican Political Ad, Campaign Fund for Kyleen Fischer.

When the political advertisement spoke of "political deals," one of the "deals" was a "deal" on the Eustis Middle School between the League (Poole) and Green. Green did not make any deals with the NAACP, the League, or Poole. Furthermore, the statement in the radio advertisement that Green had been endorsed by the NAACP was false.

On November 22, 1994, the Florida Division of Elections ("Division") received a sworn complaint signed by Sandra Green alleging violations of Florida's election laws on the part of Fischer. On February 9, 1996, after an investigation by the Division, the Florida Elections Commission ("Commission") entered an order finding that there was probable cause to believe that Fischer violated Section 104.271(2), Florida Statutes.

A formal evidentiary hearing was held before the Commission on June 6 and August 2, 1996. The Commission rendered its Final Order on January 3, 1997, which found Fischer to be in violation of Section 104.271, Florida Statutes, and fined her $5,500.00. An appeal was taken to the First District Court of Appeal which affirmed the Commission's decision *per curiam* without an opinion on January 23, 1998, *Fischer v. Division of Elections*, 706 So. 2d 289 (Fla. 1st DCA 1998). Rehearing was denied on February 9, 1998.

REASONS FOR DENYING THE PETITION

The decision below does no violence to the high level of protection accorded core political speech by the U.S. Constitution. The petition for certiorari should be denied because this case involves nothing more than a straightforward application of settled First Amendment principles to false speech, made with actual malice. Such expression is not protected by the First Amendment and makes the speaker subject to the imposition of damages or, as here, monetary fines, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). The Commission's and the reviewing appellate court's decisions in this case do not conflict with any decision of this Court or any court of appeals, and raise no issue of nationwide importance.

The Commission and the reviewing Florida appellate court were well aware that a "clear and convincing" standard must have been met as to all parts of the *New York Times v. Sullivan* test. The facts of this case clearly show that the standard was met and that the decisions below were correct.

Fischer's statements in the flyer were false and were made with actual malice. Fischer knew that Green had made no statements regarding a position on the closing or consolidation of the high schools since 1992, and had not engaged in any action, official or otherwise, since that time to in any way further such a goal. Nevertheless, she printed a flier with assertions that any reader could only see as falsely reflecting present actions and present statements by Green.

Furthermore, Fischer intentionally led the reader to the conclusion that Green had not only made the statements attributed to her by a newspaper but that the newspaper statements were verbatim quotes from Green. Fischer thus falsely printed statements that led a reader to believe that Green had actually made statements that she had never made. As this Court has held the deliberate alteration or misattribution of quoted material is a

compelling indication of actual malice if the alteration of the quoted statement results in a material change to its meaning and harms the subject-as occurred here, *Masson v. New Yorker Magazine Inc.*, 501 U.S. 496, 511-520 (1991).

The Commission's finding of "actual malice" with regard to the radio advertisement also correctly applies applicable First Amendment jurisprudence. The radio ad involved assertions of fact, referred to Green, was defamatory, was intended to harm Green's election campaign, and was false. The Commission correctly applied the "reckless disregard" prong of the *New York Times* standard in determining that Fischer had violated the law in publishing her radio ad.

The Commission found clear and convincing evidence in the record that Fischer in fact entertained serious doubts about the truth of her assertions before they were published. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The Commission went through a lengthy analysis in coming to its conclusion that Fischer, at the time of her dissemination of the advertisement, had obvious reasons to harbor serious doubts that the NAACP had endorsed any candidate in the school board race and that Fischer had no legitimate reason to believe that a "deal" had been made between Green and anyone.

Since the appropriate tests for "actual malice" and "reckless disregard" were applied correctly by the Commission and the appellate court, this case reflects an unexceptional application of the Court's First Amendment pronouncements and does not merit further review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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